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No. 78-18

In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLIAM COURTNEY BATTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-12) is reported at 573 F. 2d 599.

JURISDICTION

The judgment of the court of appeals on rehearing was entered on April 13, 1978. A petition for rehearing with a suggestion of rehearing *en banc* was denied on June 5, 1978 (Pet. App. A-14). The petition for a writ of certiorari was filed on July 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether evidence of petitioner's participation in a cocaine sale was properly admitted at his trial for importation of marijuana and possession of marijuana with intent to distribute.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted of importing and possessing with intent to distribute 15 kilograms of hashish, in violation of 21 U.S.C. 841(a)(1), 952, 960(a)(1) and (b)(2). He was sentenced to the custody of the Attorney General for treatment under the Youth Corrections Act pursuant to 18 U.S.C. 5010(b) (Pet. 2-3). The court of appeals affirmed, with one judge dissenting (Pet. App. A-1 to A-13).

The evidence presented at trial established that on September 30, 1975 petitioner and Michael Heiges were stopped for routine questioning as they were re-entering the United States at the port of entry near Lynden, Washington (Tr. 3-5). An initial search of the cab of the truck in which they were riding revealed marijuana seeds, and a more thorough search uncovered 15 bricks of hashish concealed in the wall of the truckbed (Tr. 7-10, 15). A set of tools, including the type of screwdriver needed to open the panel concealing the hashish, was also found in the truck; petitioner stated that the tools belonged to him (Tr. 43-46, 103). At the time of his arrest, petitioner was wearing a silver trinket around his neck, which he identified to a customs agent as a "coke spoon" (Tr. 47-48). This small silver spoon was admitted into evidence without objection (Tr. 48), and a Drug Enforcement agent later testified such spoons are used for inhaling cocaine (Tr. 85).

Petitioner took the stand in his own defense and testified that he had accompanied Heiges in order to help repair a mutual friend's car, which had broken down in Canada (Tr. 107-108). Petitioner denied having any knowledge of the presence of the hashish inside the truck (Tr. 119-120). On cross-examination, petitioner was asked to identify the coke spoon, and he stated that it had been a gift from his

girlfriend (Tr. 135). He also said that he did not know what it was supposed to be used for, and that he had used it to clean the dirt from under his fingernails (Tr. 135-136). Petitioner's girlfriend and another witness corroborated his claim that the coke spoon was part of a necklace given to petitioner by his girlfriend (Tr. 145, 164-165).

On rebuttal, over petitioner's objection, the government introduced the testimony of an undercover agent of the Seattle police that, seven months before the hashish incident, petitioner had agreed to sell him an ounce of cocaine for $1,275 (Tr. 169-176). The trial court instructed the jury to consider this evidence only for the limited purposes of showing knowledge and intent and impeaching petitioner's credibility (Tr. 176-177). The court of appeals affirmed, with Judge Kennedy dissenting (Pet. App. A-1 to A-13).[1]

ARGUMENT

1. Petitioner contends (Pet. 9-12) that the cocaine involved in the prior sale was illegally seized, and accordingly both the cocaine and any other fruits of the illegal seizure should have been suppressed. The prior cocaine transaction was established through the testimony of the undercover agent of the Seattle police (Tr. 170-176). The agent identified three bags of white powder as the substance he received from petitioner, and they were marked as an exhibit (Exh. 14, Tr. 177). The agent was unable to identify a vial containing a small amount of white

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[1]The panel had issued an earlier opinion (Pet. App. A-15 to A-26) affirming petitioner's conviction, from which Judge Kennedy dissented (Pet. App. A-27 to A-35). That opinion was subsequently withdrawn, and the case set for argument *en banc* (Pet. App. A-41 to A-42). However, after the case had been argued before the *en banc* court, the court determined that the case was not appropriate for *en banc* consideration, and remanded it to the panel (Pet. App. A-43).

powder, and the prosecutor struck that exhibit (Tr. 177). The agent then testified that the white powder he purchased from petitioner had been tested and identified as cocaine (Tr. 178). The bags of cocaine were never admitted (Tr. 178; Pet. App. A-8 to A-9). Petitioner urges (Pet. 8) that because this cocaine was the result of an "admittedly-illegal search and seizure," the exhibition of the bags and the testimony that they had been found to contain cocaine violated the settled rule against the admission of the fruits of an unlawful search and seizure.

This argument is without merit, since petitioner has failed to establish that the cocaine was seized in violation of the Fourth Amendment, or even put that question in issue at his trial. Neither court below held that the seizure was violative of petitioner's constitutional rights.[2] Although petitioner objected to the admission of the undercover agent's testimony on other grounds, he did not contend that it was the product of an illegal search and seizure and no findings pertinent to that question were made (Tr. 153-159). The record contains no more than a

[2]The majority apparently assumed that there had been an illegal search and seizure as petitioner alleged, but concluded that, because the cocaine exhibits had been withdrawn (Tr. 177-178), no tainted evidence was actually admitted at trial and that, because the jury had already been told that cocaine was the subject of the negotiations, the mere viewing of the exhibits was, if error, harmless (Pet. App. A-9, n. 7). The majority noted it was discussing the suppression issue, although the question was not properly before them (Pet. App. A-8, n. 7). Judge Kennedy, who made the same assumption, dissented because he concluded from his reading of the record that at least one of the cocaine exhibits had in fact been admitted as evidence, as well as the laboratory analysis (Pet. App. A-10 to A-11).

brief reference by counsel to the fact that the cocaine had been suppressed by the state court (Tr. 158-159).[3] Petitioner now relies solely on this state court decision to establish the illegality of the seizure, and offers no independent reason for such a finding.

It is well settled that a state court decision suppressing evidence in proceedings in which the United States was not a party has no estoppel effect in federal criminal proceedings, and the federal court must make an independent determination whether evidence should be suppressed. *United States* v. *Brown,* 557 F. 2d 541, 545 (C.A. 6); *United States* v. *Mejias,* 552 F. 2d 435, 444 (C.A. 2); *United States* v. *Panebianco,* 543 F. 2d 447, 456 (C.A. 2); certiorari denied, 429 U.S. 1103; *United States* v. *Sifuentes,* 504 F. 2d 845, 849 (C.A. 4); *Boyle* v. *United States,* 395 F. 2d 413 (C.A. 9), certiorari denied, 393 U.S. 1089. Accordingly, the state decision upon which petitioner relies does not establish that the cocaine should have been suppressed in the instant case.

2. Petitioner also contends (Pet. 12-14) that the court of appeals erred in holding that evidence of his prior cocaine sale was admissible under Rule 404(b) of the Federal Rules of Evidence. He argues (Pet. 13) that the fact he may have once sold cocaine "is not even circumstantial evidence" that the hashish was in the truck, unless the jury is permitted to infer that he had the character of a drug dealer. He emphasizes that Rule 404(b) expressly prohibits use of evidence of other crimes " 'to prove the character of a person in order to show that he acted in conformity therewith.' "

[3]The prosecutor stated (Tr. 159) that it was his "understanding" that the state court had suppressed the cocaine based upon its conclusion that under state law, despite the exigent circumstances, the officers were required to knock and announce themselves before entering a

This argument is also without merit. Although Rule 404(b) prohibits the admission of evidence of other crimes or wrongs to prove character, it expressly distinguishes the use of evidence of other crimes "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, indentity, or absence of mistake or accident." Petitioner was charged with importation and possession of marijuana with intent to distribute. He did not dispute the fact that marijuana had been found in the truck in which he had been riding, and the only genuine issues in the case are whether petitioner knew of the presence of the marijuana in the truck, and whether he had the intent to distribute it. Petitioner contended that he had no knowledge of the presence of the marijuana, and he attempted to develop a general air of innocence and ignorance about illicit drugs. He testified that he was "amazed" when the marijuana was discovered, and that he asked to have some pictures taken because no one would believe that this incident could happen to him (Tr. 118, 121). He indicated that he was unfamiliar with the terminology used to describe the marijuana (Tr. 120), and he testified that he had not known the trinket on the necklace he wore was a coke spoon until he was questioned about it by federal agents (Tr. 135-136). He also added that he had no knowledge about cocaine use (Tr. 135).

In this context, the court of appeals correctly concluded (Pet. App. A-5 to A-6) that evidence of petitioner's participation in a cocaine sale seven months before the incident in question, which established his familiarity with

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private home to arrest the persons selling cocaine to the undercover agent. In the instant proceedings, of course, federal law, not state law, would govern the admissibility of the cocaine. *Cady* v. *Dombrowski*, 413 U.S. 433, 449; *Rios* v. *United States*, 364 U.S. 253, 260-261; *United States* v. *Dudek*, 530 F. 2d 684, 689-691 (C.A. 6); *United States* v. *Burke*, 517 F. 2d 377 (C.A. 2).

and involvement in drug trafficking, was admissible under Fed. R. Evid. 404(b) as probative of petitioner's knowledge that the marijuana was in the truck, and his intent to engage in a distribution scheme. For example, in *United States* v. *Rocha*, 553 F. 2d 615 (C.A. 9), the court held that evidence of a prior arrest for transportation of marijuana was admissible in a trial for possession of marijuana with intent to distribute in order to show the defendant's knowledge and intent when he testified he found the marijuana and was taking it to the authorities. And in *United States* v. *Marshall*, 526 F. 2d 1349, 1360-1361 (C.A. 9), certiorari denied, 426 U.S. 923, evidence of the defendant's possession of cocaine at time of arrest was admitted to show defendant, who was charged with conspiracy to possess and distribute heroin, knew the character and use of heroin. See *United States* v. *Brunson*, 549 F. 2d 348, 358-361 (C.A. 5); *United States* v. *Brown*, 547 F. 2d 438, 444-446 (C.A. 8), certiorari denied *sub nom. Hendrix* v. *United States*, 430 U.S. 937[4].

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[4]Petitioner notes (Pet. 10 n. 1) that the original opinion (which was withdrawn) held (Pet. App. A-19 to A-23) that this evidence was admissible to impeach his credibility under Fed. R. Evid. 608(b). He correctly observes that Rule 608(b) prohibits the use of extrinsic evidence of prior criminal acts to impeach a witness' credibility. Here, however, since the evidence was properly admitted to show petitioner's knowledge and intent, the district court did not err in instructing the jury that they could consider the evidence as impeaching petitioner's credibility as well as proving his knowledge and intent. Cf. *United States* v. *Brown*, *supra*, 547 F. 2d at 444-446. The purposes served by Rule 608(b)'s prohibition on the use of extrinsic evidence to attack credibility are preventing an undue extension of the trial on a collateral matter and avoiding unfair surprise and prejudice. 3 Weinstein's *Evidence*, para. 608[05], pp. 608-21 to 608-22 (1977). These policies have no relevance once the extrinsic evidence is admitted on other grounds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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